

Sep 26, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LISA RENEE G.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

NO: 2:18-CV-00239-FVS

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 12 and 13. This matter was submitted for consideration without oral argument. The Plaintiff is represented by Attorney Dana C. Madsen.

¹ Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 The Defendant is represented by Special Assistant United States Attorney Lars J.
2 Nelson. The Court has reviewed the administrative record, the parties' completed
3 briefing, and is fully informed. For the reasons discussed below, the Court
4 **GRANTS** Defendant's Motion for Summary Judgment, ECF No. 13, and **DENIES**
5 Plaintiff's Motion for Summary Judgment, ECF No. 12.

6 **JURISDICTION**

7 Plaintiff Lisa Renee G.² filed for supplemental security income and
8 disability insurance benefits on September 29, 2015, alleging an onset date of
9 January 31, 2013. Tr. 196-204. Benefits were denied initially, Tr. 131-34, and
10 upon reconsideration, Tr. 136-40. A hearing before an administrative law judge
11 ("ALJ") was conducted on February 24, 2017. Tr. 36-72. Plaintiff was
12 represented by counsel and testified at the hearing. *Id.* The ALJ denied benefits,
13 Tr. 13-32, and the Appeals Council denied review. Tr. 1. The matter is now
14 before this court pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

15 **BACKGROUND**

16 The facts of the case are set forth in the administrative hearing and
17 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner.
18 Only the most pertinent facts are summarized here.

19
20 ² In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's first
21 name and last initial, and, subsequently, Plaintiff's first name only, throughout this
decision.

1 Plaintiff was 48 years old at the time of the hearing. Tr. 233. She graduated
2 from high school and completed four years of college. Tr. 45, 238. She was in an
3 abusive relationship three years prior to the hearing, and at the time of the hearing
4 she lived with a friend “most of the time.” Tr. 41-42, 49-51, 57. Plaintiff has work
5 history as a bookkeeper, cashier, receptionist, lube tech, stocker, and telemarketer.
6 Tr. 44-48, 63-64. She testified that she could not work because of panic attacks,
7 anxiety, and PTSD. Tr. 41, 48-49.

8 Plaintiff testified that she has daily panic attacks that last from a few minutes
9 to a few hours, depression, nightmares, PTSD, and anxiety. Tr. 52, 59. She
10 testified that medication helps “a little bit” with her mental health symptoms. Tr.
11 53. Plaintiff reported that she is unable to drive, unable to grocery shop, does no
12 housework or laundry, and doesn’t leave her room aside from helping with cooking
13 “once in a while.” Tr. 54-58, 63.

14 STANDARD OF REVIEW

15 A district court’s review of a final decision of the Commissioner of Social
16 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
17 limited; the Commissioner’s decision will be disturbed “only if it is not supported
18 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
19 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
20 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
21 (quotation and citation omitted). Stated differently, substantial evidence equates to
“more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and

1 citation omitted). In determining whether the standard has been satisfied, a
2 reviewing court must consider the entire record as a whole rather than searching
3 for supporting evidence in isolation. *Id.*

4 In reviewing a denial of benefits, a district court may not substitute its
5 judgment for that of the Commissioner. If the evidence in the record “is
6 susceptible to more than one rational interpretation, [the court] must uphold the
7 ALJ’s findings if they are supported by inferences reasonably drawn from the
8 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district
9 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
10 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
11 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The
12 party appealing the ALJ’s decision generally bears the burden of establishing that
13 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

14 **FIVE-STEP EVALUATION PROCESS**

15 A claimant must satisfy two conditions to be considered “disabled” within
16 the meaning of the Social Security Act. First, the claimant must be “unable to
17 engage in any substantial gainful activity by reason of any medically determinable
18 physical or mental impairment which can be expected to result in death or which
19 has lasted or can be expected to last for a continuous period of not less than twelve
20 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
21 impairment must be “of such severity that he is not only unable to do his previous
work[,] but cannot, considering his age, education, and work experience, engage in

1 any other kind of substantial gainful work which exists in the national economy.”
2 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
5 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
6 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
7 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
8 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
9 404.1520(b), 416.920(b).

10 If the claimant is not engaged in substantial gainful activity, the analysis
11 proceeds to step two. At this step, the Commissioner considers the severity of the
12 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
13 claimant suffers from “any impairment or combination of impairments which
14 significantly limits [his or her] physical or mental ability to do basic work
15 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
16 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
17 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
18 §§ 404.1520(c), 416.920(c).

19 At step three, the Commissioner compares the claimant’s impairment to
20 severe impairments recognized by the Commissioner to be so severe as to preclude
21 a person from engaging in substantial gainful activity. 20 C.F.R. §§
404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more

1 severe than one of the enumerated impairments, the Commissioner must find the
2 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
8 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
9 analysis.

10 At step four, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing work that he or she has performed in
12 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

13 If the claimant is capable of performing past relevant work, the Commissioner
14 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
15 If the claimant is incapable of performing such work, the analysis proceeds to step
16 five.

17 At step five, the Commissioner considers whether, in view of the claimant's
18 RFC, the claimant is capable of performing other work in the national economy.
19 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
20 the Commissioner must also consider vocational factors such as the claimant's age,
21 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
3 work, analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four. *Tackett v.*
6 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,
7 the burden shifts to the Commissioner to establish that (1) the claimant is capable
8 of performing other work; and (2) such work “exists in significant numbers in the
9 national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,
10 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 At step one, the ALJ found that Plaintiff has not engaged in substantial
13 gainful activity since January 31, 2013, the alleged onset date. Tr. 18. At step
14 two, the ALJ found that Plaintiff has the following severe impairments: major
15 depressive disorder, generalized anxiety disorder with social phobia, posttraumatic
16 stress disorder (PTSD), alcohol dependence/abuse, hypertension, asthma/chronic
17 obstructive pulmonary disease, and minimal cervical degenerative disc disease and
18 scoliosis. Tr. 19. At step three, the ALJ found that Plaintiff does not have an
19 impairment or combination of impairments that meets or medically equals the
20 severity of a listed impairment. Tr. 19. The ALJ then found that Plaintiff has the
21 RFC

1 to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b).
2 She can lift and carry twenty pound[s] occasionally, ten pounds frequently.
3 She can stand and/or walk six hours in an eight-hour workday and sit six
4 hours in an eight-hour workday. She can perform no more than frequently
5 climbing of ramps and stairs, balancing, crouching, crawling, kneeling, and
6 stooping. She must never perform climbing of ladders, ropes, or scaffolds.
7 She must avoid concentrated exposure to pulmonary irritants and must have
8 no exposure to unprotected heights, dangerous moving machinery and
9 commercial driving. She is limited to no more than simple routine tasks that
10 do not involve more than brief superficial contact with the general public
11 and that would not require the performance of tandem teamwork endeavors
12 with coworkers throughout the workday.

13 Tr. 21. At step four, the ALJ found that Plaintiff is unable to perform any past
14 relevant work. Tr. 25. At step five, the ALJ found that considering Plaintiff's age,
15 education, work experience, and RFC, there are other jobs that exist in significant
16 numbers in the national economy that Plaintiff can perform, including: office
17 cleaner, small parts assembler, and mail clerk. Tr. 26-27. On that basis, the ALJ
18 concluded that Plaintiff has not been under a disability, as defined in the Social
19 Security Act, from January 31, 2013, through the date of this decision. Tr. 27.

20 ISSUES

21 Plaintiff seeks judicial review of the Commissioner's final decision denying
him disability insurance benefits under Title II of the Social Security Act and
supplemental security income benefits under Title XVI of the Social Security Act.

ECF No. 12. Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ properly considered Plaintiff's symptom claims; and
2. Whether the ALJ properly considered the medical opinion evidence.

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DISCUSSION

A. Plaintiff's Symptom Claims ³

An ALJ engages in a two-step analysis when evaluating a claimant's testimony regarding subjective pain or symptoms. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not required to show that his impairment could reasonably be expected to cause the severity of the symptom he has alleged; he need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal

³ Plaintiff concedes that she "does not challenge the ALJ's finding that she is limited to light work"; rather, she "argues that the ALJ did not correctly assess [Plaintiff's] mental impairments and that the ALJ's conclusions are not supported by substantial evidence." ECF No. 14 at 1. Thus, the Court declines to address Plaintiff's claimed physical limitations, and will confine the analysis to Plaintiff's claimed mental impairments.

1 citations and quotations omitted). “General findings are insufficient; rather, the
2 ALJ must identify what testimony is not credible and what evidence undermines
3 the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th
4 Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ
5 must make a credibility determination with findings sufficiently specific to permit
6 the court to conclude that the ALJ did not arbitrarily discredit claimant’s
7 testimony.”). “The clear and convincing [evidence] standard is the most
8 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
9 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
10 924 (9th Cir. 2002)).

11 Here, the ALJ found Plaintiff’s medically determinable impairments could
12 reasonably be expected to cause some of the alleged symptoms; however,
13 Plaintiff’s “statements concerning the intensity, persistence and limiting effects of
14 these symptoms are not entirely consistent with the medical evidence and other
15 evidence in the record” for several reasons. Tr. 22.

16 *1. Lack of Objective Medical Evidence*

17 First, the ALJ noted that “the record, as a whole does not document
18 longitudinal objective medical findings of abnormality or other evidence that
19 supports a conclusion of total disability under the Social Security Act.” Tr. 22. An
20 ALJ may not discredit a claimant’s pain testimony and deny benefits solely
21 because the degree of pain alleged is not supported by objective medical evidence.

Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947

1 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir.
2 1989). However, the medical evidence is a relevant ant factor in determining the
3 severity of a claimant’s pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20
4 C.F.R. § 404.1529(c)(2).

5 Here, the ALJ set out the medical evidence contradicting Plaintiff’s claims
6 of disabling mental limitations during the relevant adjudicatory period. For
7 example, the ALJ noted that despite “waxing and waning in symptoms,” the
8 overall record indicates that Plaintiff’s mental health symptoms were “generally
9 stable,” with examination findings of normal speech, normal eye contact, and
10 proper orientation. Tr. 22, 358-60, 370, 377, 380, 419, 436, 491, 532, 538, 560,
11 584, 618, 629. Moreover, as noted by the ALJ, Plaintiff’s “providers found her
12 with normal thought processes, normal thought content, and appropriate affect
13 throughout” the adjudicatory period. Tr. 22-23, 332, 359, 367, 374, 382, 383-86,
14 402, 408, 415, 495, 499, 503, 507, 528-29, 552, 566, 623.

15 Plaintiff fails to identify or challenge this reasoning in his opening brief;
16 thus, the Court may decline to consider this issue. *Carmickle v. Comm’r of Soc.*
17 *Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). Regardless, the Court’s
18 review of the ALJ’s decision indicates that Plaintiff’s treatment records were
19 considered in their entirety, including evidence that at times during the relevant
20 adjudicatory period Plaintiff presented with panic disorder, anxiety, and
21 depression. Tr. 22-25. Based on the foregoing, and regardless of evidence that
could be interpreted more favorably to Plaintiff, it was reasonable for the ALJ to

1 find the severity of Plaintiff's symptom claims was inconsistent with medical
2 evidence during the relevant adjudicatory period. "[W]here evidence is susceptible
3 to more than one rational interpretation, it is the [Commissioner's] conclusion that
4 must be upheld." *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). The lack
5 of corroboration of Plaintiff's claimed limitations by the medical evidence was a
6 clear, convincing, and unchallenged reason for the ALJ to discount Plaintiff's
7 symptom claims.

8 *2. Exaggeration and Inconsistent Statements*

9 Second, the ALJ noted that Dr. John Arnold, the examining psychologist,
10 observed that Plaintiff's "statements suggested some embellishment on her part
11 and her comments about her alcohol consumption was inconsistent with the
12 treatment records of evidence. Accordingly, Dr. Arnold noted that his examination
13 of [Plaintiff] was 'generally' but not wholly valid due to her probable
14 embellishment at times." Tr. 22-23 (citing Tr. 395). The tendency to exaggerate
15 provides a permissible reason for discounting Plaintiff's reported symptoms.
16 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). Moreover, conflicting
17 statements about substance abuse may support an ALJ's "negative conclusions
18 about [Plaintiff's] veracity." *Thomas*, 278 F.3d at 959; *see also Smolen v. Chater*,
19 80 F.3d 1273, 1284 (9th Cir. 1996) (in evaluating symptom claims, the ALJ may
20 utilize ordinary evidence-evaluation techniques, such as considering prior
21 inconsistent statements).

1 First, the Court declines to address Plaintiff's inconsistent statements about
2 her substance use because the issue was not raised with specificity in Plaintiff's
3 briefing. *Carmickle*, 533 F.3d at 1161 n.2. Second, Dr. Arnold specifically found
4 that "[i]n summary, [the test results are] judged a generally valid and reliable
5 sample of [Plaintiff's] current psychological functioning with some apparent
6 minimization and probable embellishment at times." ECF No. 12 at 17 (citing Tr.
7 395). However, as noted by Plaintiff, "[e]ven with that qualification," Dr. Arnold
8 opined that she had moderate to severe limitations in her ability to sustain
9 concentration, maintain stamina, work under time pressure, interact with others,
10 handle feedback, and respond to change. Tr. 396. Thus, Plaintiff contends that "it
11 would not be appropriate for the ALJ to discount Dr. Arnold's opinion based upon
12 statements in his report taken out of context." ECF No. 12 at 18.

13 However, Plaintiff does not specifically challenge the ALJ's rejection of Dr.
14 Arnold's opinion, and the Court's review of the record indicates that the ALJ does
15 not rely on evidence of exaggeration as a reason to discount Dr. Arnold's opinion.
16 *See* Tr. 24. Rather, in the context of evaluating Plaintiff's symptom claims, the
17 Court finds it was permissible for the ALJ to rely on Dr. Arnold's findings in the
18 "credibility" section of his evaluation that Plaintiff's test scores indicated
19 "probable embellishment at times." Tr. 395; *Tonapetyan*, 242 F.3d at 1148. This
20 tendency to exaggerate was a clear and convincing, and largely unchallenged,
21 reason for the ALJ to discount Plaintiff's symptom claims.

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1 3. *Daily Activities*

2 Third, the ALJ found that Plaintiff's

3 treatment records have failed to support the persistency of her allegations.
4 For example, while [Plaintiff] reports that she is unable to sustain at tasks
5 due to her panic attacks and anxiety, notably, her treatment records have
6 shown that she has remained capable of performing a numerous degree of
7 tasks, such as interacting with friends, applying for appropriate financial
8 assistance, attending doctor's appointments, and living in numerous
9 locations. In fact, while [Plaintiff] testified that she never leaves her room,
10 never performs household chores, never shops in stores, and never drives,
11 she acknowledged on her Functional Report and to her providers that she
12 shops in stores, cooks, cleans and drives when necessary.

13 Tr. 25, 258-59, 329, 377, 380, 396, 535, 554, 558, 601. A claimant need not be
14 utterly incapacitated in order to be eligible for benefits. *Fair*, 885 F.2d at 603; *see*
15 *also Orn*, 495 F.3d at 639 ("the mere fact that a plaintiff has carried on certain
16 activities . . . does not in any way detract from her credibility as to her overall
17 disability."). Regardless, even where daily activities "suggest some difficulty
18 functioning, they may be grounds for discrediting the [Plaintiff's] testimony to the
19 extent that they contradict claims of a totally debilitating impairment." *Molina*,
20 674 F.3d at 1113.

21 As an initial matter, the Court notes that Plaintiff did not identify or
 challenge this reason in her opening brief. *See Kim v. Kang*, 154 F.3d 996, 1000
 (9th Cir. 1998) (the Court may not consider on appeal issues not "specifically and
 distinctly argued" in the party's opening brief). In her reply brief, Plaintiff argues
 that the activities outlined by the ALJ in support of this finding were "limited"; and
 "[s]ince [Plaintiff] was homeless, [she] would have no choice other than to do

1 couch surfing, live with ex-husband and his girlfriend and live with her daughter
2 and son and girlfriend.” ECF No. 14 at 8-9. However, regardless of evidence that
3 could be viewed more favorably to Plaintiff, it was reasonable for the ALJ to
4 conclude that Plaintiff’s documented activities and social functioning, including
5 her ability to sustain tasks and interact with people, was inconsistent with her
6 allegations of incapacitating mental limitations. Tr. 28-29; *Molina*, 674 F.3d at
7 1113 (Plaintiff’s activities may be grounds for discrediting Plaintiff’s testimony to
8 the extent that they contradict claims of a totally debilitating impairment); *See*
9 *Burch*, 400 F.3d at 679 (where evidence is susceptible to more than one
10 interpretation, the ALJ’s conclusion must be upheld). This was a clear and
11 convincing reason to discredit Plaintiff’s symptom claims.

12 4. *Failure to Comply with Treatment*

13 Fourth, while not identified by either party, the ALJ found that
14 “[a]dditionally limiting [Plaintiff’s] testimony is the fact that despite her
15 allegations of severity, [Plaintiff] has never required inpatient treatment for her
16 mental conditions, has often gone months or years without any treatment at all.”
17 Tr. 25. The ALJ also noted that in September 2015, Plaintiff acknowledged to Dr.
18 Arnold that she had not been in counseling for the past two years. Tr. 23, 395.
19 Unexplained, or inadequately explained, failure to seek treatment or follow a
20 prescribed course of treatment may be the basis for an adverse credibility finding
21 unless there is a showing of a good reason for the failure. *Orn v. Astrue*, 495 F.3d
625, 638 (9th Cir. 2007). This was a clear, convincing, and entirely unchallenged

1 reason for the ALJ to discount Plaintiff's symptom claims. *See Kim*, 154 F.3d at
2 1000 (the Court may not consider on appeal issues not "specifically and distinctly
3 argued" in the party's opening brief).

4 5. *Improvement*

5 Finally, the ALJ noted that "despite waxing and waning," Plaintiff's
6 symptoms improved with treatment. Tr. 22-23. The effectiveness of medication
7 and treatment is a relevant factor in determining the severity of a claimant's
8 symptoms, 20 C.F.R. § 404.1529(c)(3), 416.929(c)(3); *see Warre v. Comm'r of*
9 *Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (Conditions effectively
10 controlled with medication are not disabling for purposes of determining eligibility
11 for benefits) (internal citations omitted); *see also Tommasetti v. Astrue*, 533 F.3d
12 1035, 1040 (9th Cir. 2008) (a favorable response to treatment can undermine a
13 claimant's complaints of debilitating pain or other severe limitations). In support
14 of this finding, the ALJ cited several instances in which Plaintiff reported
15 improvement or "stability" in symptoms after undergoing treatment, including
16 medication. Tr. 22-23 (citing Tr. 358, 370, 380, 386, 436).

17 However, after considering the evidence offered by the ALJ to support the
18 finding that Plaintiff's symptoms "proved greatly aided by her counseling and
19 medication compliance," the Court finds the ALJ appeared to rely almost entirely
20 on portions of the record that favored the ultimate rejection of Plaintiff's symptom
21 claims. *See Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984) (an ALJ
"cannot reach a conclusion first, and then attempt to justify it by ignoring

1 competent evidence in the record that suggests an opposite result”). For example,
2 while Plaintiff did report she was doing “a little better,” and her anxiety attacks
3 “decreased overall” in February 2013, subsequent records in 2013 included
4 ongoing reports of anxiety, panic attacks, depression. Tr. 358-79. Likewise, the
5 ALJ found that “within months” of beginning counseling in 2015, her symptoms
6 were “greatly aided by her counseling and medication compliance.” Tr. 23.
7 However, the only records cited by the ALJ in support of this finding were
8 Plaintiff’s intake note in October 2015, and one subsequent record in January
9 2016, in which Plaintiff reported her anxiety was stable but her mental health
10 symptoms still “wax and wane.” Tr. 23 (citing Tr. 436, 635). As noted by
11 Plaintiff, and not specifically considered by the ALJ, records throughout 2015 and
12 2016 indicate that Plaintiff continued to experience panic attacks, depression, and
13 anxiety. ECF No. 14 at 3-4 (citing Tr. 573-75, 585-88, 597-99, 608-11, 617-18,
14 625-26, 630, 640-41).

15 For the foregoing reasons, the Court finds the ALJ did not offer substantial
16 evidence to support rejecting Plaintiff’s symptom claims due to sustained
17 improvement in her mental health symptoms across the overall record. However,
18 even assuming the ALJ erred in this reasoning, any error is harmless because, as
19 discussed above, the ALJ’s ultimate rejection of Plaintiff’s symptom claims was
20 supported by substantial evidence. *See Carmickle*, 533 F.3d at 1162-63.

21 The Court concludes that the ALJ provided clear and convincing reasons,
supported by substantial evidence, for rejecting Plaintiff’s symptom claims.

B. Medical Opinions

There are three types of physicians: “(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant's file] (nonexamining [or reviewing] physicians).” *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001) (citations omitted).

Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's. *Id.* If a treating or examining physician's opinion is uncontradicted, the ALJ may reject it only by offering “clear and convincing reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). Conversely, “[i]f a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)).

“However, the ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory and inadequately supported by clinical findings.” *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (quotation and citation omitted).

Plaintiff argues that “[i]nstead of relying upon the opinions of the psychologists that evaluated [Plaintiff] and relying upon the statements of her counselors and doctors that treated her, the ALJ has improperly relied exclusively

1 on non-examining sources.” ECF No. 12 at 19. As an initial matter, the Court
2 notes that the only opinions in the record, aside from the state agency reviewing
3 opinions, were two separate assessments by examining psychologist Dr. John
4 Arnold. Tr. 329-33, 393-96. Plaintiff fails to identify or challenge the ALJ’s
5 rejection of Dr. Arnold’s opinions in her opening brief. *Carmickle*, 533 F.3d at
6 1161 n.2 (the Court may decline to address an issue not raised with specificity in
7 the opening brief). In her reply brief, Plaintiff generally contends that the ALJ did
8 not have specific and legitimate reasons to discount Dr. Arnold’s opinion. ECF
9 No. 14 at 9. However, at no point does Plaintiff “specifically and distinctly”
10 identify or challenge any of the ALJ’s reasons for discounting Dr. Arnold’s
11 opinion. *See Kim*, 154 F.3d at 1000 (the Court may not consider on appeal issues
12 not “specifically and distinctly argued” in the party’s opening brief). Despite
13 Plaintiff’s waiver, the Court will review the ALJ’s findings regarding Dr. Arnold’s
14 opinions.

15 In March 2014, Dr. Arnold opined that Plaintiff had marked limitations in
16 her ability to perform activities within a schedule, maintain regular attendance, be
17 punctual within customary tolerances without special supervision, and complete a
18 normal workday and workweek without interruptions from psychologically based
19 symptoms. Tr. 23-24, 331. The ALJ gave no weight to Dr. Arnold’s “check-
20 marked opinions” because (1) they were “not supported by appropriate medical
21 findings documented in the longitudinal evidence of record,” including objective
medical evidence; (2) they were not supported by the narrative portion of Dr.

1 Arnold's own report; and (3) "it is a reasonable assumption that his conclusions
2 regarding [Plaintiff's] mental limitations relied on the subjective allegations she set
3 forth to him in support of her attempt to establish" disability. Tr. 24. These were
4 specific, legitimate, and unchallenged reasons to reject the marked limitations
5 opined by Dr. Arnold in March 2014. *See Tommasetti*, 533 F.3d at 1041 (ALJ may
6 properly reject a medical opinion if it is inconsistent with the provider's own
7 treatment notes); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th
8 Cir. 2004) (an ALJ may discount an opinion that is conclusory, brief, and
9 unsupported by the record as a whole, or by objective medical findings);
10 *Tommasetti*, 533 F.3d at 1041 (ALJ may reject a physician's opinion if it is based
11 "to a large extent" on Plaintiff's self-reports that have been properly discounted).

12 In September 2015, Dr. Arnold opined that Plaintiff would have severe
13 limitations in maintaining stamina, multitasking, interacting with others, and
14 handling feedback. Tr. 24, 396. The ALJ gave this opinion little weight because
15 (1) it "relied solely upon [Plaintiff's properly discounted] subjective allegations"
16 which have "been diminished by evidence of inconsistency in the records,"
17 including Plaintiff's inconsistent statements about substance use; and (2) Plaintiff's
18 "ability to live in numerous environments and obtain the resources needed in order
19 to live successful[ly] shows a greater ability to perform tasks and be around others
20 than [Plaintiff] acknowledges." Tr. 24. These are specific, legitimate, and
21 unchallenged reasons to reject the severe limitations opined by Dr. Arnold in
September 2015. *See Tommasetti*, 533 F.3d at 1041 (ALJ may reject a physician's

1 opinion if it is based “to a large extent” on Plaintiff’s self-reports that have been
2 properly discounted); *Morgan v. Comm’r Soc. Sec. Admin.*, 169 F.3d 595, 601-02
3 (9th Cir. 1999) (ALJ may discount an opinion that is inconsistent with a claimant’s
4 reported functioning).

5 Finally, Plaintiff argues that the ALJ erred by relying on the opinions of
6 state agency reviewers Dr. Eugene Kester and Dr. Gary L. Nelson. ECF No. 12 at
7 19-20 (citing Tr. 76-85, 105-15). Dr. Kester and Dr. Nelson opined that Plaintiff
8 “remains capable of performing simple, routine tasks, so long as she is allowed
9 small group settings or work away from the public.” Tr. 23, 83-85, 113-14. The
10 ALJ gave these opinions great weight because they are consistent with Plaintiff’s
11 treatment records “which [have] shown” her ability to interact socially “as
12 needed.” Tr. 23. Plaintiff argues that the ALJ erred by relying on these opinions,
13 as opposed to Dr. Arnold’s opinions, because the reviewing doctors did not
14 examine Plaintiff, and “the only knowledge that the non-examining non-treating
15 doctors would have about [Plaintiff’s] medical records would be based on reading
16 Dr. Arnold’s two reports.” ECF No. 14 at 9-10. This argument is inapposite for
17 several reasons.

18 First, the Court’s review of Dr. Kester and Dr. Nelson’s opinions indicate
19 that they reviewed multiple treatment records from the relevant adjudicatory
20 period, in addition to Dr. Arnold’s opinions, which they only “partially adopted”
21 because his opinions were “not fully supported by the overall evidence.” Tr. 79-
82, 107-111. Moreover, while an ALJ generally gives more weight to an

1 examining doctor's opinion than to a non-examining doctor's opinion, a non-
2 examining doctor's opinion may nonetheless constitute substantial evidence if it is
3 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278
4 F.3d 947, 957 (9th Cir.2002); *Orn*, 495 F.3d at 632–33. Here, Dr. Kester and Dr.
5 Nelson reviewed the available medical evidence, and as noted by the ALJ, their
6 opined limitations were consistent with Plaintiff's treatment records and her social
7 activities. ECF No. 13 at 10. The Court finds no error in the ALJ's consideration
8 of Dr. Kester and Dr. Nelson's opinion.

9 CONCLUSION

10 A reviewing court should not substitute its assessment of the evidence for
11 the ALJ's. *Tackett*, 180 F.3d at 1098. To the contrary, a reviewing court must
12 defer to an ALJ's assessment as long as it is supported by substantial evidence. 42
13 U.S.C. § 405(g). As discussed in detail above, the ALJ provided clear and
14 convincing reasons to discount Plaintiff's symptom claims, and properly
15 considered the medical opinion evidence. After review the court finds the ALJ's
16 decision is supported by substantial evidence and free of harmful legal error.

17 ACCORDINGLY, IT IS HEREBY ORDERED:

18 1. Plaintiff's Motion for Summary Judgment, ECF No. 12, is **DENIED**.

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2. Defendant's Motion for Summary Judgment, ECF No. 13, is

GRANTED.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel, enter judgment in favor of the Defendant, and **CLOSE** the file.

DATED September 26, 2019.

s/ Rosanna Malouf Peterson
 ROSANNA MALOUF PETERSON
 United States District Judge